IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WAVEDIVISION HOLDINGS, LLC	)	
MICHIGAN BROADBAND, LLC	)	
v.	)	**CIVIL ACTION NUMBER**
HIGHLAND CAPITAL	)	
MANAGEMENT L.P., TRIMARAN	)	08C-11-132-JOH
CAPITAL PARTNERS LLC,	)	
HIGHLAND CREDIT STRATEGIES	)	
FUND; HIGHLAND CREDIT	)	
STRATEGIES FUND, L.P.,	)	
HIGHLAND FLOATING RATE	)	
FUND, HIGHLAND FLOATING	)	
RATE ADVANTAGE FUND,	)	
HIGHLAND CREDIT	)	
OPPORTUNITIES CDO, L.P.,	)	
HIGHLAND CREDIT	)	
OPPORTUNITIES CDO LTD.,	)	
HIGHLAND CRUSADER OFFSHORE	)	
PARTNERS, L.P., HIGHLAND	)	
CRUSADER FUND GP, L.P.,	)	
HIGHLAND LOAN FUNDING V	)	
CORP., HIGHLAND LOAN	)	
FUNDING V LTD., BRENTWOOD	)	
CLO CORP., EASTLAND CLO	)	
CORP., GLENEAGES CLO CORP.,	)	
GRAYSON CLO CORP.,	)	
GREENBRIAR CLO CORP.,	)	
JASPER CLO CORP., LIBERTY	)	
CLO CORP., RED RIVER CLO	)	
CORP., SOUTHFORK CLO CORP.,	)	
BRENTWOOD CLO., LTD.,	)	
EASTLAND CLO, LTD.,	)	
GLENEAGLES CLO, LTD.,	)	
GRAYSON CLO, LTD., GREENBRIAR	)	
CLO, LTD.,JASPER CLO, LTD.,	)	
LIBERTY CLO., LTD., RED RIVER	)	
CLO, LTD., SOUTHFORK CLO, LTD.,	)	
ATASCOSA INVESTMENTS, LLC,	)	
BURNETT PARTNERS, L.P.,	)	
GILLESPIE INCOME FUND, LLC,	)	
HOPKINS CAPITAL PARTNERS, LLC,	)	
LOAN FUNDING IV, LLC,	)	
LOAN FUNDING VII, LLC.,	)	

MILAM HIGH YIELD, LLC,)
NAVARRO INVESTMENT PARTNERS,)
LLC, PIONEER FLOATING RATE)
TRUST, PRESIDIO CAPITAL)
MANAGEMENT, LLC, and **GRAND**)
CENTRAL ASSET TRUST,)

Submitted: June 21, 2011
Decided: October 31, 2011
Corrected Cover Page: November 2, 2011

MEMORANDUM OPINION

Upon Motion of Defendants for Summary Judgment - ***GRANTED***

Appearances:

Gary F. Traynor, Esquire, Tanya E. Pino, Esquire, and Nicole M. Fairies, Esquire, of Pricket Jones & Elliott, P.A., Wilmington, Delaware, and Donald P. Badgley, Esquire, and Randall Johnson, Esquire, of Badgley-Mullins Law Group, Seattle, Washington, Attorneys for Wavedivision and Michigan Broadband

Daniel K. Hogan, Esquire, of the Hogan Firm, Wilmington, Delaware, and Paul B. Lackey, Esquire, and Michael P. Aigen, Esquire, of Lackey Hershman, LLP, Dallas, Texas, Attorneys for Highland Capital Management and The Crusader Funds

Kenneth J. Nachbar, Esquire, and Karl G. Randall, Esquire, of Morris Nichols Arsht & Tunnell, LLP, Wilmington, Delaware, and Frances S. Cohen, Esquire, and Brandon L. Bigelow, Esquire, of Bingham McCutchen, LLP, Boston, Massachusetts, Attorneys for Pioneer Floating Rate Trust

Stephen B. Braurman, Esquire, and Justin R. Alberto, Esquire, of Bayard P.A., Wilmington, Delaware, and Arthur H. Ruegger, Esquire, of SNR Denton US, LLP, New York, New York, Attorneys for Trimaran Capital Partners, LLC

Michael F. Bonkowski, Esquire, of Cole Schotz Meisel Forman & Leonard, P.A., Wilmington, Delaware, Attorneys for Highland Credit Strategies Fund, Highland Floating Rate Fund and Highland Floating Rate Advantage Fund

HERLIHY, Judge

Plaintiffs WaveDivision Holdings, LLC, and Michigan Broadband, LLC have sued several investment funds and investment fund management companies for allegedly sabotaging its contract to purchase assets from Millennium Digital Media Systems, LLC. They assert claims against defendants for tortious interference with contractual relations, civil conspiracy and aiding and abetting tortious conduct. The defendants respond that their actions in blocking the deal between Wave and Millennium's were justified because they were protecting their existing investment in Millennium. The defendants, either individually or as a member of a group of defendants, have each moved for summary judgment. Plaintiffs oppose summary judgment for all defendants. All of the defendants' motions for summary judgment are GRANTED.

Parties

Wave and Millennium - The Cable TV Companies

WaveDivision Holdings, LLC, a Delaware entity, and its wholly-owned subsidiary Michigan Broadband, LLC,[1] a Delaware entity, (collectively "Wave") are in the business of acquiring, upgrading and expanding struggling cable television and telecommunications systems.[2] After acquiring a cable television system, Wave typically invests capital to upgrade its services and expand the system's customer base.

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[1] Michigan Broadband was formed by Wave for the sole purpose of operating the Michigan cable systems it had contracted to acquire from Millennium.

[2] Plaintiffs' Answering Brief to Highland Retail's (the parties identified as Highland Retail are defined on page 2 of this Opinion) Motion for Summary Judgment at *5.

Millennium Digital Media Systems, LLC ("Millennium"), a Delaware entity, now known as Broadstripe, owned and operated cable television systems in the Pacific Northwest, Michigan and the Mid-Atlantic regions. In 2004 and 2005, Millennium was facing financial problems as a result of growing debt obligations and flat cash flows attributable to a declining customer base. As a result of its financial problems, Millennium entered an agreement to sell some of its assets to Wave. Millennium eventually terminated its agreement with Wave and opted, instead, for a deal to refinance its debt.

Millennium was owned by Millennium Digital Media Holdings, LLC. Millennium Digital Media Holdings, LLC was owned by TSG Cable Investment Corp. ("TSG"), Caravelle Millennium Investment Corp. ("Caravelle") and Millennium Partners LLC. These equity owners each had representation on Millennium's management committee. Kevin Westbrook, President and CEO of Millennium, represented Millennium Partners LLC on the management committee. Darryl Thompson was TSG's representative on the management committee. Caravelle was represented by William Phoenix and Andy Heyer of Trimaran Fund Management LLC. Trimaran Fund Management LLC, a Delaware entity, acted as financial advisor to Caravelle.

Millennium's Investors and the Related Financing Entities

Highland Capital Management, L.P. ("Highland Capital"), a Delaware entity, is an investment advisor based in Dallas, Texas, which manages approximately $22 billion

dollars in assets.[3] David Walls was an investment manager for Highland Capital from October 2000 until 2008. He had portfolio responsibility for secured bank debt and unsecured increasing rate notes in the cable industry. After making a decision to purchase debt, another individual at Highland Capital would determine how to allocate the debt between the various Highland Capital managed entities.

The Highland Capital managed entities include Highland Crusader Fund, a Delaware entity, and Highland Crusader Offshore Partners, a Bermuda entity, (the "Crusader Funds" or collectively with Highland Capital referred to as "Highland Capital and the Crusader Funds"), which have filed jointly for summary judgment.

Highland Capital also managed Highland Credit Strategies Fund, Highland Floating Rate Fund and Highland (Floating Rate Advantage Fund) (collectively "Highland Retail"), all of which acquired interests in Millennium's senior secured credit facility after being purchased by Highland Capital. Wave alleges Highland Retail acquired its interest in Millennium's senior credit facility for the purpose of blocking the sale of Millennium's assets to it.[4] The Highland Retail funds have filed a joint motion for summary judgment.

A group of thirty-two Highland Capital managed entities[5] ("Highland Institutional

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[3] Faries Aff (Exhibit 15).

[4] Highland Managed Institutional Funds Opening Brief for Summary Judgment App., Ex. D (Walls Dep. March 4, 2011 at 156:13-157:23).

[5] Highland Credit Strategies Fund, L.P.; Highland Credit Opportunities CDO, L.P.; Highland Credit Opportunities CDO LTD.; Highland Loan Funding V Corp.; Highland Loan Funding V Ltd.; Brentwood CLO Corp.; Eastland CLO Corp.; Gleneagles CLO Corp.; Grayson (continued…)

Funds") are alleged to have provided the funds used for refinancing Millennium's debt in lieu of the asset sale to Wave. The refinancing was arranged by defendants Highland Capital and Trimaran Capital Partners, L.P. ("Trimaran"). The Highland Institutional Funds filed a joint motion for summary judgment.

Trimaran Capital Partners, LLC ("Trimaran") is the parent company of Trimaran Fund Management LLC and Trimaran Advisors LLC. Trimaran Fund Management and Trimaran Advisors, in their capacity as financial advisors, managed debt and equity interests in Millennium both prior to and after the failed agreement to sell assets to Wave. Trimaran individually filed its motion for summary judgment.

Pioneer Floating Rate Trust ("Pioneer"), a Delaware entity, provides shareholders a vehicle to invest in senior floating rate bank loans and other high yield credits. At some point relevant to this litigation, defendant Highland Capital acted as sub-advisor to Pioneer. In its capacity as sub-advisor, Highland Capital allocated some senior secured investments in Millennium debt to Pioneer's fund. Pioneer individually filed its motion for summary judgment.

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[5](…continued)
CLO Corp.; Greenbriar CLO Corp.; Jasper CLO Corp.; Liberty CLO Corp.; Red River CLO Corp.; Southfork CLO Corp.; Brentwood CLO, Ltd.; Eastland CLO, Ltd.; Gleneagles CLO, Ltd.; Grayson CLO, Ltd.; Greenbriar CLO, Ltd.; Jasper CLO, Ltd.; Liberty CLO, Ltd.; Red River CLO, Ltd.; Southfork CLO, Ltd.; Atascosa Investments, LLC; Burnet Partners, LLC; Gilespie Income Fund, LLC; Hopkins Capital Partners, LLC; Loan Funding IV, LLC; Loan Funding VII, LLC; Milam High Yield Fund, LLC; Navarro Investment Partners, LLC; and Presidio Capital Management, LLC.

Grand Central Asset Trust ("GCAT") is also a Delaware statutory trust that invests in secured debt. GCAT, like Pioneer, appointed Highland Capital as its financial advisor. Highland Capital used GCAT's funds to purchase Millennium's senior secured debt. GCAT filed a motion for summary judgment, but it has subsequently entered into a settlement agreement with Wave and has been dismissed from this case.[6]

Facts

Millennium's Credit Facilities

Millennium operated cable television and telecommunications systems in the Pacific Northwest, Michigan, and the Mid-Atlantic regions. Millennium had equity and debt investors. Its equity investors included TSG, Caravelle and Millennium Partners. The equity investors were each represented on Millennium's management committee. Millennium had two tiers of outstanding debt, first-tier senior secured notes and second-tier unsecured mezzanine debt. Millennium extended credit to its senior secured lenders, mostly banks, under a First Amended and Restated Credit Agreement ("Senior Secured Credit Agreement"), dated December 29, 2000.[7] Highland Capital-managed funds began purchasing Millennium's senior debt in February 2005.[8] The Senior Secured Credit

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[6] Stipulation and Order of Dismissal as to Grand Central Asset Trust entered by the Court August 17, 2011.

[7] Highland Capital and the Crusader Funds' Opening Br. at 5; Dep. Of Kelvin Westbrook, dated March 4, 2011 ("Westbrook Dep."), at 18:24-19:10 (Apx. at 22-A); Ex. 2 (Apx. at 146).

[8] Highland Capital and the Crusader Funds' Opening Br. at 5; Dep. Of David Walls, dated
(continued…)

Agreement also provided the senior secured creditors consent rights with respect to the sale, lease, transfer, or disposition of Millennium assets.[9]

During the late 1990s, Millennium obtained financing through the sale of $70 million of unsecured high-yield senior Increasing Rate Notes ("IRN").[10] The IRN holders included Trimaran, Highland Capital and funds managed by Trimaran and Highland Capital.[11] The increasing rate notes became due on March 31, 2009.[12] The agreement covering the increasing rate notes contained a clause regarding the creditors rights with respect to the disposition of Millennium's assets.[13]

Sometime around 2004, Millennium's customer base was decreasing. This caused Millennium's cash flow to become stagnant and created financial problems. Millennium's IRN obligation continued to grow. The Senior Secured Credit Agreement required Millennium to maintain certain leverage ratios. Millennium attempted to refinance its debt in 2004 but it was apparently unsuccessful. Because Millennium was unable to refinance

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[8](…continued)
March 24, 2011 ("Walls Dep."), at 32:10-24 (Apx. At 336-A).

[9] First Amended and Restated Credit Agreement dated December 29, 2000 at 47.

[10] Highland Capital and the Crusader Funds' Opening Br. at 4; Millennium Digital Media Capital, LLC, Note Purchase Agreement dated October 5, 1999.

[11] Compl., ¶ 42; Highland Capital and the Crusader Funds' Opening Br. at 4.

[12] Millennium Digital Media Capital, LLC, Note Purchase Agreement dated October 5, 1999.

[13] HC and Crusader brief p. 4-5; Millennium Digital Media Capital, LLC, Note Purchase Agreement dated October 5, 1999 at 8, 18, 20, 25.

its debt, and to avoid default, it sought covenant relief from the senior secured creditors. The senior secured creditors, still mostly banks, agreed and the parties executed a Fifth Amendment to the Senior Secured Credit Agreement (the "Fifth Amendment") on May 31, 2005. The Fifth Amendment required that Millennium sell all or substantially all of its assets to repay the senior secured creditors.

Pursuant to its obligation under the Fifth Amendment, Millennium engaged Daniels & Associates to market its assets for sale. Daniels & Associates distributed information to potential buyers and accepted bids. Wave submitted an offer of $157 million to purchase the Michigan and Northwest cable systems. On December 19, 2005, Wave and Millennium signed a Letter of Intent for the purchase and sale of the systems at the price offered by Wave. Wave's bid did not include disposition of the Mid-Atlantic assets. Millennium's debt obligations to the senior secured creditors and the IRN holders far exceeded the combined value of the Mid-Atlantic assets and proposed purchase price from Wave.

On January 5, 2006, Millennium informed the IRN holders of Wave's bid and told the IRN holders that their consent was required to close the transaction. The IRN holders responded by informing Millennium that the price offered by Wave was insufficient. The meeting was attended by Darren Fredette and Jay Bloom of Trimaran and David Walls of Highland Capital among others. Trimaran was the largest IRN holder and Highland Capital also held IRNs at that time. The IRN holders believed they could receive more in a future sale if they funded capital expenditures and grew the cable systems. Trimaran's

representatives suggested that Millennium make a presentation to the IRN holders showing projections for the return on investment if the IRN holders made a $30 million investment in Millennium for capital expenditures. Millennium noted its need for $79 million in funding for capital expenditures. David Walls indicated that Highland Capital was willing and able to refinance Millennium's credit facility.

Despite the IRN holder's concern, Millennium's management committee forged ahead in its agreement to sell the assets to Wave. On February 8, 2006, Millennium and Wave entered into an Asset Purchase Agreement (the "APA") for the Michigan system and a Unit Purchase Agreement (the "UPA" and, collectively with the APA, the "Agreements") for the Northwest system. The Agreements contain many similar terms. Both Agreements required the consent of the IRN holders and the senior secured creditors, unless Wave and Millennium reasonably believed such consent was not necessary. Millennium was obligated to use commercially reasonable efforts to obtain seller required approvals and was prohibited from initiating, soliciting, or encouraging, or providing information or engaging in discussions for purposes of the making of any proposal, "that may reasonably be expected to lead to, any effort or attempt by any other Person to seek or effect the acquisition of the Business, any ownership interests in the LLC, any of the Systems or the Transferred Assets."[14]

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[14] Plaintiffs' Answering Brief in Opposition to Defendants Highland Capital and the Crusader Funds' Motion for Summary Judgment at 12 (citing Section 5.9 of the APA and UPA).

The IRN holders, disapproving of the potential sale of assets to Wave, decided to engage Barrier Advisors, a consulting firm, to prepare a recommendation regarding: (1) whether or not to consent to the Agreements; and (2) potential alternatives to the Agreements. Millennium agreed to fund the Barrier engagement and informed Wave of this arrangement. Wave did not express an objection.

Barrier concluded that the IRN holders would not recover their investment if the Agreements closed. Wave's representative has subsequently admitted this fact.[15] Next Barrier focused on the increase in value to the IRN holders if they provided Millennium with funds for capital expenditures to upgrade the cable systems.

Upon consideration of Barrier's recommendation, Highland Capital purchased additional senior debt in an effort to protect its financial stake in Millennium. Highland Financial Corporation, not a defendant in this action, submitted a refinancing proposal to Millennium on March 8, 2006. The proposed refinancing was contingent upon the termination of the Agreements. The refinancing proposal called for a full debt-for-equity swap of the IRN notes. In April 2006, Millennium and Wave engaged in communications regarding whether consent to the Agreements was required under the IRN Agreement. Millennium expressed its position that the consents were required; however, Wave did not agree. Around the same time, Highland Capital and Trimaran provided Millennium notice of their decisions to refrain from consenting to the Agreements. The senior secured lenders would not consent to the Agreements either, because the IRN holders refused to consent.

[15] Deposition of James A. Penney, dated March 17, 2011, at 79:11-18.

On July 28, 2006, Millennium gave notice to Wave of its decision to terminate the Agreements. On the same day, Millennium accepted the refinancing proposal from Highland Capital, Trimaran and the IRN holders. Under the terms of the refinancing, the IRN holders interests converted to an equity interest in Millennium. Barrier's consultant on the recommendations, Bill Schreffler, became President and CEO of Millennium. Because Trimaran was previously the largest IRN holder, it became the largest equity holder. Highland Capital became the largest senior secured lender after the refinancing.

As a result of the failed deal to purchase Millennium's assets, Wave filed suit for breach of contract against Millennium in the Court of Chancery. Millennium filed a motion for summary judgment which Chancery denied on October 1, 2008. Shortly thereafter Millennium filed for bankruptcy protection in the United States Bankruptcy Court for the District of Delaware. After Millennium sought bankruptcy protection, Wave initiated the present action seeking damages for tortious interference with contractual relations, civil conspiracy and aiding & abetting tortious conduct. Wave originally filed suit against only Millennium and Trimaran. However, based on parties identified in the bankruptcy proceeding as current creditors to Millennium, Wave amended its complaint to include them in this matter, as additional thirty-eight defendants. Wave alleges those defendants provided the financing for the Millennium refinancing.

Those additional defendants filed motions to dismiss. This Court denied defendant's motions to dismiss on March 31, 2010 because the complaint was timely filed and specific

enough under the less stringent pleading standard to survive the motions to dismiss.[16] However, the Court made it clear in its Memorandum Opinion that defendants' claim of justification as a defense to tortious interference may be more appropriately considered in a motion for summary judgment after discovery. The parties have conducted extensive discovery and provided the Court with a sufficient factual record to address the issues at this time.

Meanwhile, the breach of contract action proceeded to trial in Chancery. Which held that Millennium breached its contract with Wave in several respects. First, by pursuing refinancing options after the Wave agreement was signed, violating the no solicitation provisions in the agreements. To seek that alternative deal meant Millennium had to share inside information in contravention of this provision. Its work with the IRN holders to craft a refinancing proposal was a breach of this provision.

There was an additional breach, Chancery found, of Millennium's duty to use reasonable efforts to obtain required approvals. Millennium's focus was not on its contract with Wave but on working with others, without Wave's knowledge, to get new financing. Such was not its reasonable best effort to consumate the Wave deal. Chancery awarded $14,872,000 to Wave.[17]

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[16] *WaveDivision Holdings, LLC v. Highland Capital Management, L.P.*, 2010 WL 1267126 (Del. Super. Mar. 31, 2010).

[17] *WaveDivision Holdings, LLC v. Millennium Digital Media Systems, LLC*, 2010 WL 3706624 (Del. Ch. Sept. 17, 2010).

Parties' Contentions

The defendants advance various arguments they contend entitle them to summary judgment. There is no one contention they make which applies to all except as noted below. The Court deems it more efficient to summarize the arguments raised and which defendants raise them. The contentions are: (1) Wave's action is barred by the statute of limitations because Texas law not Delaware law applies; (2) Wave's breach of contract action in Chancery bars this separate action for tortious interference by operation of collateral or judicial estoppel; (3) some of the defendants were justified in the actions which shield them from liability for tortious interference; and (4) several defendants became owners of Millennium debt after the Wave agreements were terminated which would also shield them from liability.

All defendants argue that if not liable for the underlying tort of tortious interference, they cannot be liable for civil conspiracy and/or civil aiding and abetting.

Wave asserts its action is not barred by the applicable statute of limitations which it contends is Delaware law. Further, its action in Chancery did not involve any of these defendants as parties and tortious interference has separate and distinct elements from the action for breach of contract enabling ti to bring this action.

The parties' contentions are reviewed below.

I

Statute of Limitations/State Law to Apply

Three defendants, Highland Capital, Crusader Funds, and Highland Institutional Funds argue that Wave's action is time barred. Their argument is founded on their assertion that Texas law applies to Wave's claims for tortious interference and that Texas has a two-year statute of limitations for this claim. As Wave's action was filed more than two years past the contract termination date, it is time-barred. They also argue Texas law should apply to Wave's claim of tortious interference.

Wave counters by noting the number of Delaware entities involved in this matter and argues Delaware's three year statute applies. This would make its action timely filed.

II

Collateral/Judicial Estoppel

The same three defendants plus Highland Retail claim that Wave's action in Chancery for breach of contract collaterally and judicially estops it from the tortious interference action in this Court. Since Chancery held that Millennium caused the breach of contract, Wave is estopped, under either doctrine, from claiming anyone else caused the Agreements to be breached.

Wave points out that the breach of contract action is a central issue to this action and that this is an action in tort with different elements. Further, under Delaware tort law there can be more than one cause of an injury. As such neither collateral estoppel or judicial estoppel operate to bar this action.

III

Elements of Tortious Interference

The following argument involves allegations that the facts, viewed in a light most favorable to Wave, cannot support the required elements for a claim of tortious interference. In order to review these arguments, it is important to first identify the elements of a claim for tortious interference.

To prevail on its claim of tortious interference, Wave must prove five elements: (1) there was a contract, (2) about which the defendant knew, (3) that the defendant committed an intentional act that is a significant factor in causing the breach of such contract, (4) the act(s) was (were) without justification, and (5) the act caused injury.[18]

A

Justification

Highland Capital, Crusader Funds, Trimaran and Highland Floating Rate Advantage Fund[19] argue their actions were taken to protect their financial interests. This arises, they say, because the Agreements were not in their best financial interest as all of their debts would not have been covered by what Wave was to pay Millennium. These defendants were all investors in Millennium debt prior to the refinancing. Because Wave has to prove

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[18] *Irwin & Leighton, Inc. v. W. M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987).

[19] This fund is one of three funds which the Court has identified in this opinion as Highland retail.

these defendants acted without justification, and it cannot, these defendants cannot be liable for tortious interference.

Wave, while not disputing the legal principle, argues there are genuine issues of material fact whether these defendants' actions were justified. Another purported factual issue is whether some or all of these defendants were actually holders of Millennium's debt prior to the Agreements' termination and would be in a position to claim justification.

B

Stranger to Contract

Trimaran and Highland Floating Rate Advantage argue they were not "strangers" to the Wave/Millennium Agreements. Only a stranger to a contract, they contend, can be held liable for tortious interference and they were not.

Wave argues that since Trimaran and Floating Advantage Fund were not parties to its contracts with Millennium, they are "strangers."

C

Knowledge of Contract

Highland Institutional Fund, two funds under Highland Retail, namely Highland Credit Strategies Fund and Highland Floating Rate Fund, and Pioneer claim they had no knowledge of the Agreements. They assert, therefore, Wave cannot meet its burden of showing their knowledge as an element of tortious interference. Pioneer's argument is a little nuanced as it points out Highland Capital acted as an independent contractor, as a

sub-advisor to it, and Highland Capital's knowledge cannot be imputed to Pioneer. Wave says that whether Highland Capital was or was not an independent contractor is a material issue of fact.

Highland Institutional Funds' lack of knowledge argument is premised on not owning any debt at the time the contract was terminated. The Highland Institutional Funds rely on deposition testimony from Highland Capital and Wave's representatives to establish none of the Highland Institutional Funds owned any Millennium debt prior to the refinancing, and therefore, had no reason to know of the Agreements. Wave states that there remain factual issues of when Highland Institutional Funds acquired a financial interest in Millennium. In reply, Highland Institutional Funds states any "admissions" upon which Wave relies to make that argument have been retracted and there is no genuine issue of material fact.

D

Interference Privilege

In a sense this argument is akin to the "stranger" argument in that one cannot interfere with one's own contract. Floating Rate Advantage Fund, as a note holder prior to the contract termination asserts it had a commonality of interest with Wave and Millennium. That commonality arises, in part, out of its claimed right to consent to the sale to Wave.

Wave notes fifty-one percent of the note holders were needed to block the sale and this fund did not have fifty-one percent of the senior debt to do so.

IV

Civil Conspiracy

An essential element of a clam of civil conspiracy is that there be an underlying tort committed.[20] All the defendants argue that since Wave cannot succeed on the underlying tort claim in this case, they are not liable for civil conspiracy. The same argument applies to any claim of aiding and abetting.

Applicable Standards

Summary judgment may only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[21] The moving party has the initial burden of proving that no genuine issues of material fact exist, and that it is entitled to summary judgment.[22] If a motion for summary judgment is properly supported, the burden shifts to the non-moving party to demonstrate that there are genuine issues of material fact.[23] The non-moving party cannot rely upon unverified allegations or

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[20] *Connolly v. Labowitz*, 519 A.2d 138, 143 (Del. Super. 1986).

[21] *Windom v. Ungerer*, 903 A.2d 276, 280 (Del. 2006).

[22] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[23] *Howard v. Food Fair Stores, New Castle, Inc.*, 201 A.2d 638, 640 (Del. 1964).

assertions to meet that burden shift.[24] The Court must view the evidence in the light most favorable to the non-moving party.[25] If a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law, summary judgment is inappropriate.[26] Thus, if it appears that there is any reasonable hypothesis by which the non-moving party might recover, the motion for summary judgment will be denied.

Discussion

Statute of Limitations

Since the timeliness of Wave's action is a paramount threshold issue it must be adderssed first. Highland Capital, Crusader Funds and Highland Institutional Funds contend that Wave's action is barred by the applicable statute of limitations. They argue that the Texas two-year statute of limitations should be applied to Wave's tortuous interference claims under Delaware's Borrowing Statute. Their argument is founded on the fact that Highland Capital's principal place of business is in Texas, that whatever it did happened in Texas, and that Highland Capital is the sole and exclusive manager of Highland Institutional Funds.[27] Such an application would render Wave's claim untimely

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[24] *Martin v. Nealis Motors, Inc.*, 247 A.2d 831, 833 (Del. 1968).

[25] *Id*.

[26] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[27] Most of the funds operating under the rubric of Highland Institutional Funds are (continued…)

filed as the breach occurred on July 28, 2006, and the original action was filed in November 2008. The same defendants raised the issue of timeliness in their prior motions to dismiss, but not under a theory that utilized the Delaware borrowing statute. That statute reads as follows:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply.[28]

Whether the Delaware statute of limitations should apply turns on the last sentence of the borrowing statute: "Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply." Our courts have held this to mean that a Delaware corporation is a Delaware "resident" for the purpose of bringing an action in Delaware court.[29] Specifically, when a Delaware corporation is injured, the court may view the plaintiff corporation's injury as having taken place in Delaware, "its chosen place of legal

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[27](…continued)
Delaware entities.

[28] 10 *Del. C.* § 8121.

[29] *Sample v. Morgan*, 935 A.2d 1046, 1058 n. 44 (Del. Ch. 2007)

residence."[30] Wave is a Delaware limited liability company. These defendants argue that the last sentence of the Borrowing Statute has only been held to apply to corporations, not limited liability companies or trusts. This is an unpersuasive argument and, in this context, a distinction without a difference. It would be curious to see what they would argue if there were a role reversal. Wave for purposes of the Borrowing Statute, as a LLC, is a Delaware resident. The Delaware statute of limitations for a claim of tortuous interference with contractual relations will therefore apply.[31]

In Delaware, claims for tortuous interference with contractual relations are governed by the three year statute of limitations.[32] On July 28, 2006, Millennium terminated the Agreements, opting instead to refinance its debt with the IRN holders and defendant funds. Wave had until July 27, 2009 to file a timely complaint. The original complaint was filed in November 2008 and the Second Amended Complaint was filed on June 30, 2009. Both complaints were timely filed.

Delaware Law Applies

Highland Capital, the Crusade Funds and Highland Institutional Funds also argue that Texas law applies to Wave's claims. Delaware courts utilize four factors when determining which state's law applies: 1) the place where the injury occurred, 2) the place

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[30] *Id.*; *see also Chandler v. Ciccoricco*, 2003 WL 21040185 at *11 (Del. Ch.).

[31] The Court notes the majority of the "prime time" players in this drama are Delaware entities.

[32] 10 *Del. C.* §8106.

where the conduct causing the injury occurred, 3) the domicil, residence, nationality, place of incorporation and place of business of the parties, and 4) the place where the relationship, if any, between the parties is centered. These contacts should be evaluated according to their relative importance with respect to the issue in each particular case.[33] Although mere incorporation with the state is not necessarily the determinative factor, it is considered to be an important factor when determining which law to apply:

> The idea that a state's interests are only implicated by physical contacts is outmoded in all sorts of ways; one just has to think of how many businesses sell services without any physical contact with customers or even any delivery of a physical product. When parties choose to form a Delaware entity and utilize Delaware's system of laws and dispute resolution, they are bargaining for a valuable array of reliable services relating to their entity's internal affairs. That they choose to manufacture all the widgets the entity makes elsewhere and have its accounting done elsewhere does not render less important the legally-designated home of the entity for purposes of (1) its existence as an entity, and, most critically, (2) its relations among itself, its governing fiduciaries, and its investors.[34]

In this case, most of the parties are Delaware corporations, LLCs, or other types of Delaware entities; each doing business in a variety of states including Maryland, Missouri, Washington and Texas. While an argument could be made to apply the law of any one of these states, the factors favor application of Delaware Law because this is a case brought in Delaware between Delaware entities.

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[33] *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991).

[34] *Total Holdings USA, Inc. v. Curran Composites, Inc.*, 999 A.2d 873, 883 (Del. Ch. 2009) *appeal refused*, 984 A.2d 123 (Del. 2009).

Wave's Claims Are Not Barred Under Collateral Estoppel

In order for collateral estoppel to apply, four factors must be present: (1) the issue previously decided is identical to the issue at bar; (2) the prior issue was finally adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.[35] Collateral estoppel, however, "should not be applied if there is a difference in the extensiveness or quality of procedures available in the two tribunals that warrants re-litigation."[36] Under the doctrine of collateral estoppel, where a question of fact essential to the judgment is litigated and determined by a valid and final judgment, the determination is conclusive between the same parties in a subsequent case on a different cause of action. In such situation, a party is estopped from re-litigating the issue again in the subsequent case.[37]

Wave's action in Chancery was against Millennium for breach of the Agreements. The defendants in this case were not parties to the Agreements. Wave's complaint and Chancery's finding was that Millennium had breached the Wave contracts. Chancery did not make a finding that the present defendants had breached the Agreements, and its finding of how Millennium breached the Agreements is immaterial to the gravamen of Wave's action here.

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[35] *Clark v. St. Paul Fire & Marine Ins. Co.*, 2006 WL 309594 at *2 (Del. Super.).

[36] *Clark v. St. Paul Fire & Marine Ins. Co.*, 2006 WL 3095949 at *2 (Del. Super.).

[37] *Id.*

In a tortious interference case, a party which causes another party to breach a contract is independently liable in tort for the injury that results.[38] It is unnecessary to join the party to the contract which caused the contract breach in the action for tortious interference. Despite the fact that Chancery already held that Millennium breached the Agreement, it did not determine whether the defendant lenders interfered with the Agreements to cause Millennium's subsequent breach. Nor did Chancery determine cause in the tortious sense. Wave is not estopped from arguing cause in its claim here. Because the issue present before this Court is different from the issue decided in Chancery, collateral estoppel does not bar Wave's claims.

Wave's Claims Are Not Barred Under Judicial Estoppel

Judicial estoppel is an equitable doctrine that seeks to prevent a litigant from advancing an argument that contradicts one previously taken in the same or earlier legal proceeding.[39] The goal of the doctrine is to protect the integrity of the judicial proceedings.[40] "The basic principle ... is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory."[41] Judicial estoppel is

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[38] *CPM Indus., Inc. v. Fayda Chemical and Minerals, Inc.*, 1997 WL 762650 at *4 (Del. Ch. Dec. 1, 1997).

[39] *Motorola Inc. v. Amkor Technology, Inc.*, 958 A.2d 852, 859 (Del. 2008).

[40] *Id.*

[41] *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. (continued…)

applicable where the litigant's present position contradicts another position that the litigant previously took and that the Court was successfully induced to adopt in a judicial ruling:[42]

> [S]everal factors [that] typically inform the decision whether to apply the doctrine of judicial estoppel in a particular case [are] whether the party's later position is "clearly inconsistent" with its earlier position, whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled, and whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.[43]

Judicial estoppel does not bar the claims Wave asserts in this case. Judicial estoppel seeks to prevent a litigant from asserting contradictory arguments before different courts. Wave asserted a breach of contract action against Millennium in Chancery and now seeks to recover for claims arising in tort from entities not part of the breached contract. Wave's position in Chancery and the present action are not contradictory. Wave is not judicially estopped from raising claims against these defendants because of its prior action in Chancery.

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[41](…continued)
1996)(quoting 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4477 (1981), p. 782.

[42] *Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 409352, at *3 (Del. Ch. Jul. 13, 1998).

[43] *Julian v. Eastern States Const. Service, Inc.*, 2009 WL 1211642, at *6 (Del. Ch. May 5, 2009)(quoting *In re LJM Co-Inv., LP*, 866 A.2d 762, 782 n. 64 (Del. Ch. 2004).

Tortious Interference

To prove its claim for tortious interference, Wave must show: (1) there was a contract, (2) about which the particular defendant knew, (3) an intentional act that was significant factor in causing the breach of contract, (4) the act was without justification, and (5) it caused injury.[44] The defendants argued that Wave is unable to meet its burden of showing one or more of these elements.

There is no one element in common to all defendants, however, so the Court must parse its analysis by which element a defendant contends or defendants contend, Wave cannot prove it or them.

Justification

Highland Capital, Crusader Funds, Trimaran and Highland Floating Rate Advantage Fund claim their actions were taken to protect their financial interests in Millennium. Prior to the execution of the Wave/Millennium Agreements. Highland Capital was an investment manager for various funds. Some of these investments funds were holders of the Increasing Rate Notes ("IRN Holders") and were managed by Highland Capital or Trimaran.

In 2005, Highland Capital funds began to purchase portions of Millenniums's senior debt. Wave argues, however, that Highland Capital fails to identify which funds purchased Millennium's senior debt, some of which, it asserts, now claim they did not own

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[44] *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d at 992.

any senior debt prior to the contract terminations. The Court views this difference as not creating a genuine issue of material fact. The reason basically is, if Highland Capital were advising funds to purchase senior debt, its actions must still be determined to be justified or not justified. The justification argument comes from the claim that the Agreements would not have financially protected their investment. Wave acknowledges it must prove these entities acted without justification as an element of their claim; it "just" argues their actions were not justified or there are genuine issues of material fact about that issue.

Delaware Courts have adopted the rule set forth in the Restatement (Second) of Torts to determine if a party's actions were improper or justified.[45] The Restatement provides as follows:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
> (b) the actor's motive,
> (c) the interests of the other with which the actor's conduct interferes,
> (d) the interests sought to be advanced by the actor,
> (e) the societal interests in protecting the freedom of action of the actor and the contractual interests of the other,
> (f) the proximity or remoteness of the actor's conduct to the interference, and
> (g) the relations between the parties.[46]

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[45] *Hursey Porter & Associates v. Bounds*, 1994 WL 762670, at *13-14 (Del. Super. Dec. 2, 1994) (quoting *Restatement (Second) of Torts* § 767 (1979)).

[46] *Id.*

In *Hursey Porter & Associates v. Bounds*, this Court held that a creditor's actions in causing the debtor to breach an existing contract were justified when the creditor was protecting a financial interest in the debtor.[47] The Court analyzed the Restatement factors in its determination that the creditor's actions were not improper.[48] In so holding, this Court balanced the competing interests of the creditor in protecting its financial interest in the debtor versus the interests of the party expecting the benefit of the contractual bargain.

This Court will examine the Restatement factors to determine whether Millennium's debt holders were justified as a matter of law in convincing Millennium to refinance rather than pursue its existing contract to sell assets to Wave.

(a) *The nature of the actor's conduct*. This factor requires consideration of the means utilized by the actor in causing the interference.[49] Wave's claim of tortious interference arises from defendants' actions in successfully convincing Millennium to refinance its debt rather than pursuing the Agreements to sell its assets to it. These defendants' actions to pursue the refinancing included failing to provide consent to the Agreements, running financial projections for alternatives to the asset sale and proposing a refinancing package that required termination of the Agreements. These defendants, as debt holders of Millennium, had legitimate reasons for taking these actions. It is clear from

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[47] *Id*.

[48] *Id*.

[49] *Id*.

the record that the IRN holders would not have recovered their investment if the Wave Agreements were carried out. Because the defendants stood to lose their investment in Milliennium, their conduct was not improper under these circumstances. This factor weighs in favor of a finding that the debt holders' interference was not improper.

(b) *The actor's motive*. This factor requires an analysis of whether the purpose of a defendant's conduct was motivated by a desire to interfere with the contract.[50] If a defendant's motive was only to interfere, the interference is likely to be held improper.[51] The IRN Holders and senior secured debt holders were motivated to protect their investment in Millennium, and not motivated solely to interfere with Wave's contract. Thus, this factor weighs in favor of finding that the defendants' interference was not improper.

(c) *The interests of the other with which the actor's conduct interferes*. This factor directs the Court to consider whether the underlying relationship with which the actor interfered was one which violates public policy such as to justify the actor's inducement of a breach.[52] In the relationship between Wave and Millennium there was no public policy violation which would justify the defendants' inducement to cause a breach of the contract by Millennium. This factor weighs in favor of a finding that the defendants' interference was improper.

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[50] *Id*.

[51] *Id*.

[52] *Id*.

(d) *The interests sought to be advanced by the actor*. This factor focuses on the interest that the actor seeks to promote through interference with another's contractual or prospective contractual relationship.[53] Defendants sought to maximize their return on investment in Millennium. They were informed that they would not recover their investment in Millennium if the Agreements with Wave were carried out. Because they would not recover their investment, the defendants elected to investigate alternatives to the Agreements. The alternatives identified, including funding the debt-for-equity swap eventually accepted by Millennium, were projected to produce superior value to the defendants compared to consenting to the Agreements with Wave. It was not improper for the defendants to interfere with the Wave Agreements in order to protect their own financial interest in Millennium. Therefore, this factor weighs in favor of a finding that the defendants' conduct was not improper.

(e) *The societal interests in protecting the freedom of action of the actor and the contractual interests of the other*. This factor requires analysis and comparison of the social utility of the interests sought to be advanced by each of the litigants.[54] Wave's interest is in protecting the expected benefit of its contract without interference from third parties. Defendants' interest is in protecting their right to object to a proposed transaction that would render their investment worthless. Although defendants were a third party to the

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[53] *Id*.

[54] *Id*.

Agreements between Millennium and Wave, they would have suffered a financial loss had the Agreements not been terminated. The societal interests of Wave and the defendants are both compelling and equally important. Therefore, this factor is neutral in considering whether defendants' conduct was justified.

(f) *The proximity or remoteness of the actor's conduct to the interference*. This factor examines whether the interference was an immediate or remote consequence of the actor's conduct.[55] Millennium's termination of the Agreements was an immediate consequence of defendants' actions. They conditioned Millennium's refinancing on termination of the Agreements with Wave. It was defendants' conscious object to cause Millennium to breach its contract with Wave. This factor weighs in favor of finding that the interference was improper.

(g) *The relations between the parties*. This factor permits the Court to consider the relationship between any of the parties involved in the dispute.[56] In this case, there was a debtor-creditor relationship between Millennium and the defendants. The defendants would have suffered a financial loss if the Agreements with Wave were not terminated. Its interference with the Agreements was for the purpose of protecting their investment in Millennium. This factor weighs in favor of finding that defendants' interference was not improper.

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[55] *Id*.

[56] *Id*.

Analysis of the factors leads the Court to conclude that the defendants holding Millennium debt acted with justification in causing Millennium to breach the Agreements with Wave. It can be stated another way, Wave cannot meet its burden, even at this stage, of showing the those defendants acted without justification. Therefore, Highland Capital, Crusader Funds, Trimaran and Highland Floating Rate Advantage Fund are entitled to summary judgment as to Wave's claim for tortious interference with contractual relations.

Because Wave's claim against Trimaran and Highland Floating Rate Advantage Fund have been decided on the "justification" argument, it is unnecessary for this Court to reach those defendants' "stranger" argument.

Highland managed entities lacked knowledge of Agreements

The second element of a claim for tortious interference is that the particular defendant had knowledge of the contract that the plaintiff alleges the defendant caused to be breached.[57] The Highland Institutional Funds, Highland Credit Strategies Fund and Highland Floating Rate Funds, claim that they cannot be held liable for tortious interference because they never had knowledge of the Agreements with Wave. Wave counters by asserting that Highland Capital and these defendants were controlled by David Walls and any knowledge attributable to Highland Capital should be imputed to the defendants.

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[57] *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d at 992.

The Court has reviewed the record in an attempt to determine whether these Highland-Managed entities acted with knowledge of the Agreements with Wave. There is nothing in the record that can support Wave's claim that these defendants acted with actual knowledge. David Walls testified, during a deposition, that he was responsible for Highland Capital's decisions regarding purchasing of debt from companies in the cable industry. After Highland Capital purchased debt products, through David Walls, the debt would be syndicated and allocated among the various Highland-Managed funds. Wave has not satisfied its burden to show that there are material issues of fact regarding David Walls' testimony.

Wave points to several Admissions of Highland-Institutional Funds to argue it either owned Millennium senior debt prior to the Agreements' termination, and its actions were without justification, or there is a genuine issue of material fact about when it became a senior debt holder. In response, Highland-Institutional Funds points out these Admissions were modified to remove any preliminary, inaccurate information about when it became an owner. Its modified and/or amended responses to Wave's discovery now establish, it asserts, its ownership came after termination of the Agreement. The Court is satisfied that it is the undisputed record. That means Wave cannot show Highland-Institutional Funds were aware of the contract prior to the Agreements' termination. In short, Wave cannot prove an essential element of tortious interference - knowledge of the Agreements. In addition, Highland Credit Strategies Fund and Highland Floating Rate Fund have not been

shown to have any knowledge of the Agreements. These funds claim to have held no Millennium debt until after the refinancing. Nothing in the record supports Wave's claim that they had knowledge of the Agreements prior to the refinancing. These defendants ownership of Millennium debt is the result of allocation after David Walls made a decision to purchase the debt. The facts do not support the required element that defendants had knowledge of the Agreements.

Assuming arguendo there were evidence that the Highland-Managed Funds had knowledge of the Agreements with Wave, the Court must also impute David Walls' knowledge of the existing Highland Capital investments in Millennium to the Highland-Managed Funds. Because the Highland-Managed Funds also had knowledge of Highland Capital's prior investments in Millennium, their actions in providing financing for Millennium's refinancing were justified.

Pioneer also contends that the tortuous interference claim against it should be dismissed on summary judgment. It argues that Highland Capital was acting as an independent contractor, not an agent, and therefore, it had no knowledge of Agreements with Wave. Wave must prove that Pioneer had knowledge of the Agreements as an element of its tortuous interference claim. Wave claims it can establish that Pioneer had knowledge of the Agreements by proving that Highland Capital was acting as Pioneer's agent – and any knowledge held by Highland Capital is attributable to Pioneer. In the alternative, Pioneer asserts that the Court can grant summary judgment even if the record is

insufficient to find that Highland Capital was acting as an independent contractor. This can be accomplished by applying the adverse interest exception to the general rule that imputes an agent's knowledge to a principal. Pioneer claims Highland Capital's actions were adverse to its interest, and the adverse interest exception applies, because Highland Capital used Pioneer's senior secured debt to protect Highland Capital and other managed fund's interest in the IRNs. Pioneer had no interest in the IRNs and did not benefit from Highland Capital's actions in blocking the Agreements with Wave.

Under agency law, knowledge of the agent generally imputes to the principal.[58] In Delaware, the existence of an agency relationship is determined by analyzing several factors used to weigh the amount of authority and control retained by the purported principal. As the amount of authority and control exerted by the purported principal increase, so does the likelihood that an agency relationship existed. In relationships where less authority and control are exerted, however, the Court will likely find that the relationship involved an independent contractor. The distinction between an independent contractor and principal/agent has a significant impact on Wave's claims against Pioneer. If Highland Capital were an independent contractor, knowledge of the Agreements will not be imputed to Pioneer. If Highland Capital was an agent of Pioneer, knowledge of the Agreements can be imputed to Pioneer and Wave's tortuous interference claim against Pioneer cannot be decided on summary judgment.

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[58] *MetCap Secuities LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *10 (Del. Ch. May 16, 2007).

Fisher v. Townsends, Inc. used the Restatement (Second) of Agency, Section 220, as a non-exclusive listing of factors to be used in determining principal/agent/servant or independent contractor status:

> (a) the extent of control, which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of cooperation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.[59]

Wave correctly contends that the determination of whether a relationship is one of a principal/agent or an independent contractor is normally best left for the fact finder at

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[59] *Fisher v. Townsends, Inc.*, 695 A.2d 53, 59 (Del. 1997).

trial. That determination, however, is not required to be left for the fact finder. Prior courts have dismissed "agency" claims where no agency relationship exists.[60]

The factual record is adequate for this Court to make its decision on summary judgment. The parties have conducted extensive discovery and provide the Court voluminous documents to make its decision. Pioneer retained Highland Capital as its sub-advisor for investments in debt securities. The parties entered into a contract to memorialize the sub-advisory agreement giving Highland Capital certain rights and responsibilities. Highland Capital enjoyed the freedom to select, without consent, investments for Pioneer. One of these investments was in Millennium's senior secured debt.

Included in the sub-advisory agreement was a provision regarding proxy voting. Highland Capital had the right to vote proxies for the investments held by Pioneer. In April 2006, Highland Capital sent a letter to Bank of America and others notifying the recipients that it and its funds, including Pioneer, were not going to provide consent to the Agreements.[61] Wave contends that this one letter conclusively establishes an agency

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[60] *Brown v. Interbay Funding LLC*, 2004 WL 2579596, at *3 (D. Del. Nov. 8, 2004)(dismissing an agency claim because defendant did not exercise sufficient control over the purported agent to give rise to an agency relationship); *Rhoades v. United States*, 950 F. Supp. 623, 629-630 (D. Del. 1996)(dismissing an agency claim where the defendant did not exercise sufficient control or supervision over purported agent to amount to an agency relationship).

[61] Ladies and Gentlemen:

Reference is made to that certain First Amended and Restated Credit Agreement dated as (continued…)

[61](…continued)
of December 29, 2000 (as amended, supplemented or otherwise modified to the date hereof, the "Credit Agreement.") made by and among MILLENIUM DIGITAL MEDIA SYSTEMS, L.L.C., a Delaware limited liability company (the "Borrower"); the financial institutions which are now, or in accordance with Article XIII of the Credit Agreement, hereafter become, parties thereto (collectively, the "Lenders" and each individually, a "Lender"); BANK OF AMERICA, N.A. (as successor in interest to FLEET NATIONAL BANK) as Administrative Agent (in such capacity as Administrative Agent, together with its successors and assigns in such capacity, the "Agent"). Capitalized terms used herein without definition shall have the same meanings herein as set forth in the Credit Agreement.

The Borrower, Millennium Digital Media Capital, L.L.C., Subsidiaries and/or the Agent, have requested under Section 7.03(c) of the Credit Agreement, consent of the undersigned Lenders to certain proposed Dispositions (the "Proposed Dispositions"), as more particularly described in that unexecuted, draft Conditional Consent to Disposition bearing the notation "OMM Draft 03/08/06" (the "Draft Document"). Please be advised that the undersigned Lenders do not consent to the Proposed Dispositions. Accordingly, the undersigned Lenders decline to join as parties to the Draft Document and decline to execute and deliver any signature page (whether one or more) or fax copy thereof to the Draft Document.

The undersigned Lenders currently hold more than 50% of the sum of the aggregate outstanding principal amount of the Loans, and therefore, without the consent of the undersigned Lenders, the Proposed Dispositions remain prohibited by Section 7.03(c) of the Credit Agreement.

The undersigned Lenders expressly reserve any and all of their rights and remedies under the Loan Documents, at law or in equity.

Lenders:

FIRST TRUST/HIGHLAND CAPITAL FLOATING RATE INCOME FUND

FIRST TRUST/HIGHLAND CAPITAL FLOATING RATE INCOME FUND II

GLENEAGLES TRADING LIMITED LIABILITY COMPANY

GRAND CENTRAL ASSET TRUST, HLD SERIES

HIGHLAND FLOATING RATE ADVANTAGE FUND

HIGHLAND FLOATING RATE LIMITED LIABILITY COMPANY

(continued…)

[61](…continued)
PIONEER FLOATING RATE TRUST

IN EACH CASE BY: HIHGLAND CAPITAL MANAGEMENT, L.P.

BY: Mark Okada, Authorized Signatory

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WITH COPIES TO:

(continued…)

relationship between Pioneer and Highland Capital. Although the letter is evidence of an agency relationship, this Court does not draw the same conclusion. The letter is only one factor in the determination of whether an agency relationship, or control, existed, and it is outweighed by other factors. Highland Capital had the authority to send this letter because of the provision in the sub-advisory agreement governing proxy voting. Consent to the Agreements was essentially the same as a proxy vote. Highland Capital's decision to sign the letter on behalf of Pioneer does not create a *per se* agency relationship between the two or show the control which Wave contends Pioneer had over Highland Capital.

Analysis of these factors in light of the undisputed factual record before the Court leads to the conclusion that Highland Capital was acting as an independent contractor in carrying out its duties under the sub-advisory agreement. The intent of the parties is a relevant factor in determining the extent of control, and therefore, whether there is an agency relationship or an independent contractor.[62] The sub-advisory agreement explicitly defines the parties' intent that the sub-advisory arrangement is one of an independent

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[61](…continued)
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[62] *Fisher*, 695 A.2d at 60.

contractor. The parties' intent is not conclusive; however, it provides strong support for a finding that Highland Capital was an independent contractor. Several other factors also support finding that Highland Capital was an independent contractor. Those factors are: the lack of control exerted by Pioneer over the investment decisions made by Highland Capital and the *laissez-faire* attitude taken by Pioneer concerning Highland Capital's investment of its funds.

As evidenced by the intent of Pioneer and Highland Capital, as well as Pioneer's lack of control over the management of its funds, Highland Capital was acting as an independent contractor. Knowledge of the Agreements cannot be imputed to Pioneer and therefore, Wave cannot prove a required element of its cause of action for tortuous interference with contractual relations against it.

Even if the Court could not find that Highland Capital was acting as an independent contractor, Pioneer correctly points out that knowledge of the agent does not impute to the principal when the "adverse interest exception" applies. The adverse interest exception is narrowly construed and is only used when the agent is interested in the result of a transaction and acts adversely to the interest of the principal.[63]

Highland Capital used Pioneer funds to invest in Millennium's senior secured debt. The Agreements with Wave involved an asset sale that would have provided compensation to the senior secured debt holders, including Pioneer. Highland Capital also managed

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[63] *See Holley v. Jackson*, 158 A.2d 803, 808 (Del. Ch. 1959).

investments, held by other funds, in Millennium's IRNs. To protect the IRN Holders – not the senior secured debt holders – Highland Capital used the positions it managed in Millennium's senior secured debt to block the asset sale to Wave. Pioneer would have received compensation if the Agreements would have closed. The fact that Highland Capital used Pioneer's investments to protect other managed funds' investments, including some of its own, is enough to qualify Pioneer for the adverse interest exception.

Although the Court does not make its decision based on the adverse interest exception, it is important to include this argument in the analysis. Pioneer is the most tangential party to the plan to block the asset sale to Wave. Although not outcome determinative, the Court believes it is important to note the fact that Highland Capital acted adversely to Pioneer's interest.

For these reasons, Wave cannot make out it tortious interference claim against Pioneer.

Civil Conspiracy and Aiding & Abetting Are Not Independent

Causes Of Action And Judgment Must Be Granted

Counts II and III of the second amended complaint bring claims for civil conspiracy and aiding and abetting tortious conduct respectively. The second amended complaint alleges that defendants conspired to deprive Wave of the benefits of its contract and that the Highland-Managed funds aided and abetted tortious conduct of Highland and Trimaran.

To prove civil conspiracy, a plaintiff must prove: (1) a confederation or combination of two or more parties; (2) an unlawful act done in furtherance of the conspiracy; and (3) actual damage.[64] Civil conspiracy is not an independent cause of action; it must be predicated on an underlying wrong.[65]

Aiding and abetting is a cause of action that focuses on the wrongful act of providing assistance, unlike civil conspiracy that focuses on the agreement.[66] Liability for aiding and abetting requires proof of three elements: (1) underlying tortious conduct; (2) knowledge; and (3) substantial assistance.[67] Aiding and abetting is similar to civil conspiracy and cannot exist as an independent cause of action. Underlying tortious conduct must be proved as a predicate to liability for either civil conspiracy or aiding and abetting. Thus, because judgment has been granted for all defendants on the tortious interference with contractual relations claims, the Court must also grant judgment for defendants on the civil conspiracy and aiding and abetting claims.

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[64] *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149-50 (Del. 1987).

[65] *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 892 (Del. Ch. 2009).

[66] *Anderson v. Airco, Inc.*, 2004 WL 2827887, at *4 (Del. Super. Nov. 30, 2004).

[67] *Id.*

Conclusion

For the reasons stated herein, judgment is granted in favor of defendants on all claims.

IT IS SO ORDERED.

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J.